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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 207

RETAIL CLERKS UNION, 1550,
RETAIL CLERKS INTERNATIONAL ASSOCIATION
AFL-CIO, *et al.*, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
and
THE KROGER CO., *Intervenor*

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This reply brief is directed to a departure in the Board's rationale which has come to light after the Board and the Court of Appeals decided the instant case and after petitioners filed the Petition for a Writ of Certiorari. The Board's new rationale arose by virtue of its decision in a decertification case which was a companion proceeding to the instant case. The decertification proceedings involved the same parties, the same issues, and the same record as in the unfair labor practice case.

At approximately the same time the petitioners filed unfair labor practice charges which gave rise to the instant case, an individual employed by Kroger filed a decertification petition with the Board (App. AA, *infra*, p. 2aa).[1]

[1] The Board's Decision and Order in the decertification case is reprinted as Appendix AA to this Reply Brief, *infra*, pp. 1aa-13aa.

The same basic issue was presented in each case. In the decertification case, the issue involved was whether a multi-employer bargaining unit was an appropriate unit for collective bargaining or, as the decertification-petitioner contended, whether only a single unit of Kroger's employees was appropriate "and that a multi-employer unit never existed" (App. AA, *infra*, p. 6aa). In the unfair labor practice case, the Board was presented with the question of whether Kroger failed to bargain in good faith in an appropriate unit when it unilaterally withdrew the subject of pensions from group bargaining. The unit question was necessarily involved in that determination for if the appropriate unit had been a single employer unit, Kroger would have not violated its good faith bargaining obligation by insisting on individual bargaining with respect to pensions. The Board decided the unfair labor practice case first and without explicitly resolving the unit determination, it found that Kroger had not refused to bargain because of a past practice which had given rise to a prerogative to bargain individually on any mandatory subject. In the decertification proceedings the Board ordered a hearing thereon after reversing the Regional Director who had dismissed the decertification petition.[2] At the hearing on the decertification petition, the parties stipulated that the entire record in the unfair labor practice case constituted the record in the decertification proceedings. The unfair labor case proceeded to review by the Court of Appeals and on June 22, 1964, petitioners filed the instant Petition for a Writ of

[2] The litigation of the unfair labor practice charges proceeded in a normal time sequence. However, decision in the decertification case was stayed until the Board decided the unfair labor practice case. The Board issued its Decision and Order in the latter case on March 18, 1963. On March 26, 1963, the Board reversed the Regional Director's dismissal of the decertification petition and ordered a hearing (App. AA, *infra*, p. 3aa). On September 28, 1963, the hearing was held but it wasn't until August 27, 1964, that the Board issued its Decision and Order in the case (App. AA, *infra*, pp. 3aa, 13aa).

Certiorari. On August 27, 1964, the Board, by a three to two decision, issued a Decision and Order in the decertification case which, in our view, reflects a basic retreat from the rationale adopted in the unfair labor practice case decision.

1. To the extent that in the unfair labor practice case the Board's decision, standing alone, presents certiorari-worthy issues, we pray that the Writ be granted. Those issues have been fully presented in the Petition.

2. To the extent that the Board's decertification decision modifies and establishes a different rationale for its decision below, we pray that the Petition for a Writ of Certiorari be granted and the cause be remanded to the Court of Appeals for the District of Columbia in order to enable it to reconsider its decision in the light of the Board's decertification decision.[3] We submit that the decision below cannot stand side by side with the decision in the decertification proceedings. In the unfair labor practice case, the Board held that by virtue of a prerogative established by past practice Kroger could unilaterally withdraw from multi-employer bargaining any mandatory bargaining subject and refuse to sign the jointly-negotiated agreement. In its decertification decision, the Board did not adopt that same rationale. Instead, the Board held that Kroger could insist on individual bargaining only with respect to "limited matters" and that while group action is called for "about all matters of general concern", it decided in effect that the establishment of an industry-wide pension plan is one of the "limited problems of an individual employer" about which the group negotiations need not be burdened (App. AA, *infra*, pp. 6aa-7aa). The Board did not offer any reasons in support of the latter holding.

It is apparent that this position—now the law of the case—reflects a basic retreat from the rationale adopted in the

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[3] Cf. *People ex rel. Whitman* v. *Wilson*, *318 U.S. 688* and cases cited there; *Busey* v. *District of Columbia*, 319 U.S. 579; *Amer* v. *Superior Court*, 334 U.S. 813.

unfair labor practice decision.[4] The Board has in effect acknowledged the soundness of petitioners' basic contention with respect to the incompatibility of prerogatives to unilaterally withdraw mandatory subjects of bargaining and multi-employer units. But the Board's temporizing suffers from yet another vice for now the central issue is whether the establishment of an industry-wide pension plan is a matter of only "limited" concern and, as such, subject to unilateral withdrawal by an employer who is bargaining within the confines of a multi-employer bargaining unit. The Court of Appeals was not called upon to pass on this question, nor has it ruled on the propriety of the Board's decision in the unfair labor practice case with the benefit of consideration of the Board's new position in the decertification proceedings. This presents the anomaly that the Board's rationale which the Court of Appeals sustained has been later overruled by the Board itself.

For these reasons, we submit that the case be remanded to the Court of Appeals for reconsideration of its opinion in the light of the Board's later decision in the decertification proceedings.

Respectfully submitted
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[4] The two dissenting Board Members recognized this departure in theory and found that the existence of a prerogative to withdraw any subject of mandatory bargaining negated the existence of a multi-employer bargaining unit. Unwilling to abandon its position with respect to unilateral withdrawal, the majority of the Board Members temporized the principle to permit unilateral withdrawal of only "limited" matters.